Supreme Court of the United States

October Term, 1942.

No. 198.

NORMAN C. SCHALLER, *Petitioner,*

v.

CITY OF PHILADELPHIA.

Petitioner's Reply and Reply Brief on Petition for Writ of Certiorari.

MICHAEL FRANCIS DOYLE,
EDWARD I. CUTLER,
Attorneys for Petitioner.

International, 311 Chestnut St., Philadelphia

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IN THE

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PETITIONER'S REPLY AND REPLY BRIEF ON PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The reply of Norman C. Schaller, Petitioner, by his attorneys, to the City of Philadelphia's Answer to the Petition for Writ of Certiorari to the Superior Court of Pennsylvania respectfully represents:

(1) Although the petition for writ of certiorari was filed more than three months after the entry of judgment by the Superior Court of Pennsylvania, it was entered less than three months after the order of the State Supreme Court refusing the allowance of an appeal on April 20, 1942 (R. 24).

(2) The Superior Court is not the state court of final appellate jurisdiction on judgments entered in the Municipal Court of Philadelphia. Section 1 of the Act of March 2, 1923, P. L. 3, No. 1, 17 P. S. § 187, cited by respondent for the contrary proposition, provides as follows:

> "From and after the passage of this act, appeals from any order, judgment, or sentence of the County Court of Allegheny County, or the Municipal Court of Philadelphia, or any similar court hereafter created, not provided by law to be taken to the court of common pleas or court of quarter sessions of the peace of the particular county shall be taken to and heard by the Superior Court, and *shall not be appealable to the Supreme Court, except upon allowance as in the case of other orders, judgments,* and sentences of the Superior Court." (Emphasis supplied.)

It is well established that the Superior Court is not the court of final appeal in Pennsylvania. The Constitution of that State sets up the Supreme Court as the highest appellate tribunal in that State: Art. V, § 3. The Act of Assembly which created the Superior Court (Act of June 24, 1895, P. L. 212, § 1, 17 P. S. § 111) commences with the following language:

> "A court of intermediate appeal is hereby established to be called the superior court . . ."

Section 7 (e) of the Act of 1895 (17 P. S. § 190), expressly provides for appeal from the Superior to the Supreme Court of Pennsylvania in the following instances:

> ". . . Second. If the case involves the construction or application of the constitution of the United States or of any statute or treaty of the United States; or
>
> ". . . Fourth. If the appeal to the supreme court be specially allowed . . . by any one justice of the supreme court."

Forty-five days are allowed by state law for presentation of a petition for the allowance of an appeal under the forego-

ing section: Act of May 11, 1927, P. L. 972, § 1, 12 P. S. § 1136. The petition in the present case was well within that time.

Even though the question of constitutionality or Federal law appears to be appealable to the State Supreme Court as a matter of right, the practice has been to file a petition for allowance nevertheless:

Commonwealth v. Gardner, 297 Pa. 498, 147 Atl. 527;

In re Melon Street, 182 Pa. 397, 38 Atl. 482.

Obviously, despite this practice, the Supreme Court of Pennsylvania has final appellate jurisdiction in matters of Federal law which originate in the Municipal Court of Philadelphia, as in the instant case.

Moreover, the time for appeal to this Honorable Court is computed from the date of refusal of an appeal by the highest state court where the allowance of an appeal from an intermediate court is discretionary. This rule was clearly enunciated in litigation originating in Louisiana where the constitution made review by the highest state court discretionary. This Court held that the limit of time for applying here for certiorari dates from the refusal of such a state court to review the decision of the intermediate court:

American Express Co. v. Levee, 263 U. S. 19, 21.

Under the Fourth Paragraph of Section 7 (e) of the Act of 1895, above quoted, the highest appellate court of Pennsylvania has similar discretionary power to grant or refuse an appeal from the intermediate appellate court in all cases where the appeal is not mandatory:

Kraemer v. Guarantee Trust and Safe Deposit Co., 173 Pa. 416, 33 Atl. 1047.

Respondent's contention that the petition for writ of certiorari was not timely is, therefore, erroneous and unfounded. It completely ignores the requirement that a litigant must exhaust his remedies under the state judicial system before resort to this Court. It also ignores the settled practice of this Court in the *American Express Company case,* as well as the express wording of the state legislation which has been cited.

(3) Payment of the judgment in this case by petitioner does not deprive him of his standing on appeal under the decisions of this Court.

Petitioner respectfully calls the Court's attention to the fact that the payment was made only after a written threat of execution by respondent's counsel, a copy of which is annexed hereto as Exhibit "A". This threat was not intended as a threat of execution merely by civil process but also by criminal prosecution. The respondent has carried out a similar threat against numerous other employes of the Federal Government for non-compliance with the decision of the court below, notwithstanding notice given by petitioner's counsel that the present application for a certiorari is pending. The situation raises a clear inference that the respondent has singled out for prosecution Federal employes from numerous persons who have not paid the city wage tax, and that there has been discrimination against Federal employes in the enforcement of the wage tax ordinance in this manner. The section of the Income Tax Ordinance of the City of Philadelphia under which the threat against the petitioner was made in this case, is as follows:

"SECT. 9. VIOLATIONS; PENALTIES. Any person who shall fail, neglect or refuse to make any return required by this ordinance, or any taxpayer who shall fail, neglect or refuse to pay the tax, penalties and interest imposed by this ordinance, or any person who shall refuse to permit the Receiver of Taxes or any agent or employee appointed by him in writing to examine his books, records and papers, or who shall knowingly make any incomplete, false or fraudulent return, or who shall attempt to do anything whatever to avoid the full disclosure of the amount of earnings or profits to avoid the payment of the whole or any part of the tax, *shall be subject to a fine or penalty of one hundred (100) dollars and costs for each such offense or to undergo imprisonment for not more than thirty days for the non-payment of such fine or penalty and costs within ten days from the imposition thereof.* (Emphasis supplied.)

"Such fine or penalty shall be in addition to any other penalty imposed by any other section of this ordinance.

"The failure of any employer or any taxpayer to receive or procure a return form shall not excuse him from making a return."

Upon respondent's threat of execution pursuant to the foregoing provision and pursuant to provisions of state law for execution of judgments, petitioner paid the judgment under protest. The check contained on its face the limitation that it was being paid under protest, and the letter of transmittal from petitioner's attorney stated:

"These payments are made under protest and only because of your threat to issue execution.

"We are now arranging an appeal to the Supreme Court of the United States in the case of City v. Schaller, so that the matter may be finally determined by the highest Court."

It has long been the rule of this Court that the performance of a judgment or decree does not deprive the performing party of the right of appeal. No release of errors is implied from the fact that money or property has changed hands by virtue of the court's order. Compliance with the order of the court below does not render the issue moot on appeal. It has been stated:

> "There can be no question that a debtor against whom a judgment for money is recovered may pay that judgment and bring a writ of error to reverse it, and if reversed can recover back his money. The defendant has merely submitted to perform the judgment of the court, and has not thereby lost his right to seek a reversal of that judgment by writ of error or appeal:"

2 Enc. U. S. Supreme Court Reports 81.

This court has expressly decided that a party may pay a judgment and then appeal here: *Dakota County v. Glidden,* 113 U. S. 222, 224. This rule is based on the early decisions in *Erwin v. Lowry,* 7 How. (48 U. S.) 172, 184; *Gregg v. Forsyth,* 2 Wall. (69 U. S.) 56; *O'Hara v. MacConnell,* 93 U. S. 150.

The Encyclopedia of U. S. Supreme Court Reports, heretofore cited, further states:

> "The payment of taxes, whether voluntary or compulsory, after the dismissal of a suit to enjoin its collection, constitutes a waiver of the right to appeal."

It does not follow that a payment of a judgment for taxes prevents an appeal therefrom. The decision in *Singer Manufacturing Company v. Wright,* 141 U. S. 696, was merely that a taxpayer who sought injunctive relief against a tax but was denied that relief, and then paid the

tax before appeal, lost his right to appeal because he lost his right to equitable relief by paying the tax. It must be noted that there was no payment of a judgment in the case. In *Little v. Bowers,* 134 U. S. 547, the taxes which were paid to avoid execution were not the taxes in controversy. As stated on page 554 of that opinion, there was no threat of execution for the taxes in litigation.

In the present case there was a definite threat of execution by the respondent. This threat was carried out as to other Federal employes not only in the form of civil process but also criminal prosecution. The threat of execution was as to the very taxes in controversy. The action was not a taxpayer's proceeding for injunctive relief but was a proceeding begun by the taxing authority to enforce and collect taxes from the petitioner. The payment was of the judgment entered in the court below, and there was no compromise or settlement as in *Dakota County v. Glidden,* 113 U. S. 222, supra. Clearly the petitioner should not be refused an appeal because of his payment made under duress and under protest.

Respondent would have the Court believe that payment of the judgment on threat of execution renders the appeal moot by virtue of Pennsylvania law, citing dictum in *Allegheny Bank's Appeal,* 48 Pa. 328, at 334, that petitioner has no right of restitution.

The decisions of this Court above cited establish that this Court's appellate jurisdiction does not depend on the appellate rules of state courts. Petitioner and thousands of other Federal employes should not be deprived of their right to contest the Philadelphia City Income Tax in this Court, notwithstanding petitioner's inability to obtain restitution under State law, if such were the case.

The fact is, however, that State law does not prohibit such restitution. The early dictum cited by respondent has not been followed in recent decisions involving payment to avoid the threatened enforcement of judgments by execution process.

In *Charak v. Porter Co.,* 288 Pa. 217, 135 Atl. 730, the Supreme Court of Pennsylvania stated at pages 220 to 221:

> "Defendants thereupon under duress of the execution, paid to the sheriff the amount of the judgment, who in turn handed it over to plaintiff. Appellees now claim the questions involved in the appeal are moot. In this they are wrong, . . .
>
> "Notwithstanding the execution, the statute gives an unquestioned right to appeal within three months though it may not operate as a supersedeas. Under such circumstances, if an appellant pays the judgment, and later is successful in his appeal, an order of restitution will be made to carry out the judgment of the court. See Drabant v. Cure, 280 Pa. 181, 189."

More recently the Superior Court of Pennsylvania stated, in *J. P. Cope Hotels Co. et al. v. Fidelity-Phenix F. Ins. Co.,* 126 Pa. Superior Ct. 260, 191 Atl. 636, allocatur refused by the State Supreme Court, 126 Pa. Superior xxix, at page 269:

> "On the motion to dismiss the appeal, we are of the opinion that the payment of the judgment following an execution issued after an appeal, which was taken too late to be a supersedeas, did not render the question involved moot. It was ruled otherwise in *Charak v. Porter Co.,* 288 Pa. 217, 220, 221, 135 A. 730."

Furthermore, in the event of a reversal in this case, petitioner has a right to a refund of the taxes paid, under

the terms of Pennsylvania law, so that the question of restitution is unimportant. Assurances of the right to a refund have been made by the signer of respondent's answer.

Respondent is attempting to frustrate the purpose of the Pennsylvania courts and of the persons vitally concerned in this case to have the highest court in the land pass upon a question which is rightfully before it. Attention is respectfully invited to the language of the Superior Court indicating that such a review was contemplated by the Court (R. 16).

EDWARD I. CUTLER,
MICHAEL FRANCIS DOYLE,
Attorneys for Petitioner.

EXHIBIT "A."

CITY OF PHILADELPHIA
Department of Law
City Hall Annex

Francis F. Burch
City Solicitor

March 24, 1942

Michael Francis Doyle, Esq.
1500 Girard Trust Building
Philadelphia

Dear Mr. Doyle:

I intend to issue an execution in the case of City of Philadelphia v. Norman C. Schaller, Municipal Court, May Term, 1941 No. 55 unless the judgment entered in the aforesaid case is paid within forty eight hours.

Yours very truly,

(Signed) ABRAHAM WERNICK
Assistant City Solicitor

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End